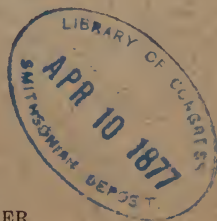


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REMARKS  
OF  
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MR. JUSTICE CLIFFORD  
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IN THE CONSULTATIONS OF THE  
ELECTORAL COMMISSION  
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5143  
RESPECTING THE  
ELECTORAL VOTES OF THE STATE OF FLORIDA.

WASHINGTON:  
JOSEPH L. PEARSON, PRINTER.  
1877.



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# REMARKS OF MR. JUSTICE CLIFFORD.

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## INTRODUCTORY EXPLANATIONS.

More than one return, purporting to be certificates of the electoral votes of the State of Florida, having been received by the President of the Senate, the same, after having been opened by that officer in the presence of the two Houses, and objections thereto having been filed in the manner required by law, the certificates, votes, and all papers accompanying the same, together with such objections, were duly submitted to the judgment and decision of the Electoral Commission to decide which, if either, was the true and lawful vote of the state from which the returns were received.

Prior to the commencement of the hearing the Commission adopted certain rules to regulate the course of its proceedings, to two of which it is proper to refer in order to a better understanding of what took place. They are in substance and effect as follows: (1) Objectors to a certificate may select two of their number to support their objections and to advocate the validity of any one or more of the other certificates, under the prescribed limitations. (2) Counsel, not exceeding two on each side, may afterwards be heard on the merits of the case.

Pursuant to the rule first named the objectors to the Hayes certificate, called certificate No. 1, were fully heard, and the objectors to the Tilden certificates, called certificates Nos. 2 and 3, were also fully heard. Special leave was given by the Commission that three counsel might speak on each side, and the time allowed by the rule was enlarged.

Pending the argument it was suggested to counsel that if they proposed to introduce evidence to support their objections it would facilitate the hearing if they should make known to the Commission in some proper form what the evidence was that they proposed to introduce. Offers of proof were accordingly made by the counsel supporting the objections to certificate No. 1, as appears in the published proceedings of the Commission. No offer of proof was submitted to the Commission by the counsel supporting the objections to the other two certificates, at that stage of the hearing.

Without entering into details, suffice it to say that a portion of the time allowed under the rule for the discussion of the merits of the case having been spent before the offer of proof was made, it was moved by Mr. Justice MILLER "that counsel be allowed two hours on each side to discuss the question whether any evidence will be considered by the Commission that was not submitted to the two Houses by the President of the Senate, and if so, what evidence can properly be considered, and also what is the evidence now before the Commission." Debate ensued, but the motion was adopted and the argument proceeded under that regulation and restriction.

Both sides were heard, and at the close of the arguments all persons present, except the members of the Commission and the officers thereof, retired and the Commission went into consultation with closed doors. Opportunity for debate was extended to every member of the Commission and all participated in the discussion before the final votes were taken. Certain remarks were made at the close of the debate by Mr. Justice CLIFFORD, in substance and effect as follows :

#### REMARKS.

Since the case was submitted to the Commission pursuant to the recent act of Congress, I have carefully examined the several certificates in question and all the written objec-

tions to the same transmitted here by the President of the Senate, in order to ascertain what the matters in controversy are and what questions are presented to the judgment and decision of the Commission. Beyond doubt those documents, with the accompanying papers, were intended by the act of Congress to present the matters in contestation to be submitted to the judgment and decision of the tribunal created for the purpose of hearing and determining such controversies. Fifteen commissioners have been appointed for the purpose, and they, as required by the act of Congress, have severally been sworn impartially to examine and consider all questions submitted to the tribunal, and to render a true judgment in the premises, agreeably to the Constitution and the laws.

Sitting under that act of Congress I shall assume that it is a constitutional act and that it correctly describes and defines the duties and the jurisdiction of the Commission.

Differences of opinion existed upon that subject before the act of Congress creating the Commission was passed. Two theories were advanced—one that the power to decide what persons were duly appointed electors in a state is vested in the President of the Senate, and the other that the sole power in that regard is vested in the two Houses of Congress. Discussion upon that topic is closed by the act of Congress, which makes it the duty of the Commission in a case submitted to it under the second section of the act, to “decide whether any and what votes from such state are the votes provided for by the Constitution of the United States, and how many and what persons were duly appointed electors in such state.”

Appointed as the members of the Commission have been under that act, they are bound by its provisions, and it is the duty of the tribunal to perform in good faith the duties which it prescribes.

Three returns or certificates are submitted to the Commission from the State of Florida, and the tribunal is required to decide what persons are duly appointed electors

from that state. Certificate No. 1, if unexplained, shows that the Hayes electors are duly appointed, and certificates Nos. 2 and 3 show that the Tilden electors were duly elected by a majority of the votes cast at the election.

Such an issue must be decided by the Commission, and all just and intelligent persons must admit that it cannot be properly decided without an inquiry into the facts and the hearing of the parties. Inquiry to a very limited extent, it is admitted, may be made, but the amazing proposition is advanced that the inquiry cannot extend beyond the examination of the papers presented by the President of the Senate to the two Houses and which were subsequently submitted to the Commission. Attempt is made to support that proposition chiefly by the argument of inconvenience. Should the inquiry be opened to a wider investigation the argument is that the Commission would not be able to close its duties in season to render the electoral votes effectual for the purpose prescribed by the Constitution.

Support to that view is attempted to be drawn from the most extravagant suppositions that ingenious minds can devise or imagine. If the suggestions were well founded they would be entitled to weight, but a few observations, I think, will be sufficient to show that the supposed dangers are merely imaginary and without any foundation whatever.

Arguments unsupported by fact are entitled to no weight and may be dismissed without consideration as mere sound and fury, signifying nothing. Judging from the issues presented by the certificates, and the objections thereto filed in behalf of the contestants, I assume that the Commission is not expected to enter into any scrutiny of the votes cast at the general election of the state, nor of the qualifications of the voters who voted for President and Vice-President at that election. Nothing of the kind is suggested in any one of the written objections and no such extravagant proposition has been advanced by any member of the Commission. Matters of that sort may, therefore, be dismissed without further remark; and it is equally clear that no at-

tack is made upon the local officers who presided in the precincts, nor does any one of the objections filed in the case impeach their conduct in receiving, sorting, or counting the votes or in declaring the result. Questions of the kind sometimes arise in other forums which give rise to difficult and protracted investigations, but no question of that character is involved in this investigation, nor can it be without a willful departure from the issues presented in the written objections filed in the case.

Impartial men everywhere must admit that the act of Congress makes it the duty of the Commission to decide "what persons were duly appointed electors" in that state, and if so it may be assumed that no member of the Commission is willing to be deterred from performing the prescribed duty by any imaginary dangers, which have no real foundation in fact.

Sufficient has already been remarked to show that none of the objections to the certificates require any scrutiny into the votes cast at the primary election or call in question the returns made by the officers who presided in the precincts. Throughout, the controversy has respect to the conduct of the state board of canvassers in dealing with the returns made by the county canvassers to the secretary of state.

Precinct inspectors are required to make duplicate certificates of the result and deliver one of the same, with the poll-lists, to the clerk of the circuit court and the other to the county judge. Six days later the county canvassers are required to meet and to make and sign duplicate certificates containing in words and figures, written in full length, the whole number of votes, the names of the persons voted for, and the number of votes given to each person for such office. Duplicate returns must be made and recorded, and the requirement also is that one of the duplicates shall be transmitted by mail to the secretary of state and the other to the governor. Provision is also made for a board of state canvassers, whose duty it is, within a prescribed period, to canvass the returns of election received from the several

counties, and to determine and declare who shall have been elected to any such office or as such member, *as shown by such returns.*

State canvassers are to determine and declare who have been elected, as shown by the county returns received from the county canvassers. Unless these views can be successfully controverted, and I submit with entire confidence that they cannot, then it follows that there are but three questions involved in the main feature of the resolution adopted by the Commission on motion of Mr. Justice MILLER, which I assume is the proper guide of the Commission in the present consultation.

1. Whether the certificate No. 1 is absolutely conclusive of the election of the Hayes electors and that it has the effect to exclude all evidence to prove the matters charged in the written objections submitted to the Commission at the same time with the certificate.

Charges of the kind involve the imputation of fraud, perjury, and forgery, and if evidence to sustain such imputations cannot be admitted, then the Congress, the President, and the Supreme Court have been misled and deceived.

2. Whether the action of the board of state canvassers is conclusive that the Hayes electors were duly appointed, and that it has the effect to shut out evidence to show error, fraud, perjury, or willful forgery.

3. Whether certificates Nos. 2 and 3 are valid, supported as they are by the action of all the branches of the state government; which, if admissible in evidence, shows to a demonstration that the Hayes electors were never duly appointed, and that they are mere usurpers.

When a person is elected to the office of elector, the requirement of the state statute is that the governor shall make out and sign a certificate of his election, cause the same to be sealed with the seal of the state, and transmit the same to the person elected to such office. Certificates of the kind to persons chosen to any state office are made

out by the Secretary of State, whose duty it is to transmit the same to the person having the highest number of votes cast, and the provision is that the "certificate shall be *prima facie* evidence of his election to such office."

Votes cast for electors are canvassed for the same purpose as votes cast for state officers, and the certificate given by the governor to an elector is given for the same purpose that the certificate of the secretary of state is given to a person supposed to be elected to a state office, and there is no reason for holding that the certificate of the governor was intended to have any other or different effect than the certificate of the secretary of state when given to a state officer, as required by the same statute.

Truth and justice, it is admitted, ought to prevail, but the argument is that such an investigation is impracticable for the want of time to complete it, and in order to give plausibility to that theory it is assumed that the objectors to certificate No. 1 propose to enter into a scrutiny of the qualification of the voters and of the votes cast at the primary election, and of the conduct of the officers who presided in the precincts, and of their returns. Assumptions of the kind are entirely without foundation, as sufficiently appears from the certificates and the written objections filed to the same, which clearly present the issues to be tried and determined by the Commission.

1. Certificate No. 1, dated December 6, 1876, signed by M. L. Stearns, governor, certifies that Frederick C. Humphreys, Charles H. Pearce, William H. Holden, and Thomas W. Long have been chosen electors of the state, agreeably to the laws of the state and in conformity to the Constitution of the United States.

Six specifications of objections were duly filed to that certificate, which in substance and effect are as follows: (1) That the persons therein named as electors were not appointed as such in the manner directed by the legislature of the state. (2) That they were not appointed electors of President and Vice-President in such manner as the legislature of the state

directed. (3) That the qualified voters of the state did, on the seventh of November, 1876, execute the power of appointing such electors, and did appoint Wilkinson Call, James L. Yonge, Robert B. Hilton, and Robert Bullock to be such electors. (4) That certificate No. 1 is untrue, and was corruptly procured, and made in pursuance of a conspiracy therein more particularly described. (5) That the papers falsely purporting to be votes are fictitious and unreal, and were made out and executed in pursuance of the same fraudulent conspiracy. (6) That the printed certificate has been annulled and declared void by the executive, and by the legislature and judiciary of the state.

Apart from that the objectors also allege that certificate No. 1 was annulled by the subsequent certificate to the Tilden electors, by which the latter were declared duly appointed in the manner provided by the legislature of the state and the Constitution, the legislature having declared that the title of the persons named as electors in the last-named certificate is good and valid. Nor do the objectors rest the case entirely upon the certificate of the governor and the legislative act, but they also set up the judgment of the circuit court rendered in the suit in the nature of *quo warranto*, and allege that it was adjudged by the court in that case that the four persons named in certificate No. 1 were not elected, chosen, or appointed electors for the state, and that the court also decided that they were mere usurpers, and were not entitled to assume or exercise any of the powers or functions of electors of President and Vice-President.

Superadded to those general specifications they also file a special objection to one of the four persons named in certificate No. 1, to wit: that Frederick C. Humphreys was ineligible as an elector because he held at the time of the election the office of shipping commissioner, which, under the act of Congress of the seventh of November, 1876, is an office of trust and profit within the meaning of the Constitution.

On December 6, 1876, the attorney-general of the state, one of the board of state canvassers, executed a certificate to Wilkinson Call, James E. Yonge, Robert B. Hilton, and Robert Bullock, called certificate No. 2, that it appears by the authentic returns on file in the office of the secretary of state that they, on the 7th of November, 1876, were chosen the four electors of the state, and that the law of the state makes no provision whereby the result shown by those returns can be certified to the executive of the state. Under that certificate the persons therein named as electors, on the same day met and cast their votes for Samuel J. Tilden for President and Thomas A. Hendricks for Vice-President.

Two objections are filed to that certificate: (1) That it is not authenticated according to the Constitution and laws of the United States, so as to enable the votes given by those four persons to be counted. (2) That the package enclosing that certificate, when opened in the presence of the two Houses, did not contain any paper from the executive of the state showing that the persons therein named were the electors appointed by the state. Nor is said certificate accompanied by any lawful authentication that they were appointed to cast the electoral vote of the state.

Florida, on the 17th of January, 1877, enacted a statute creating a board of state canvassers, and by the same statute directed that board to proceed to canvass the returns of the election of electors held on the 7th of November, 1876, and to determine and declare who were elected and appointed electors at said election, as shown by such returns on file in the office of the secretary of state. By the second section of the statute the new state board was required to canvass those returns according to the fourth section of the election law which was in force at the time the election was held for the choice of electors, as construed by the supreme court of the state. Pursuant thereto the said state board was duly constituted, consisting of the secretary of state, the governor of the state, the comptroller of public accounts,

and the treasurer of the state, and they met at the capital of the state, on the 19th of January in the same year, and made the canvass of the said returns on file in the office of the secretary of state, by which it appears that the four persons designated as the Tilden electors received a majority of all the votes cast for electors in the several precincts of the state, and that they were duly appointed such electors.

Enough also appears to show that those persons claimed title as electors duly appointed under certificate No. 2, and that they, on the 6th of December, 1876, instituted a suit in the circuit court of the second judicial circuit, in the nature of *quo warranto*, against the Hayes electors, alleging that the respondents were not entitled to those offices, and praying judgment of ouster against them as wrongfully in possession of the same. Service was made and the respondents appeared and filed an answer. Proofs were subsequently taken and the court rendered judgment in favor of the relators.

Contemporaneous action upon the subject was also taken by the legislature. On the twenty-sixth of the same month the legislature passed a statute declaring that the four persons called the Tilden electors were, on the 7th of November preceding, duly chosen and appointed electors, and that they were from that time entitled to exercise all the powers and duties of the office of electors, and had, on the sixth of December then next, full power and authority to vote as such electors and to certify and transmit their votes as provided by law.

Explicit recognition of their power and authority is there declared, and the statute proceeds to ratify, confirm, and declare valid all their acts as such electors to all intents and purposes, and to declare that they are thereby appointed electors as of the day of the prior general election.

Section two of the same act authorizes and directs the governor to make and certify in due form and under the great seal of the state three lists of the names of those persons as such electors, and to transmit the same with an au-

thenticated copy of that act to the President of the Senate of the United States. Three lists of like character were also directed to be certified by the governor, and he was directed forthwith to deliver the same to the said electors.

These directions were obeyed by the governor, and on the same day he made and delivered to the said electors the certificates designated in the proceedings before the Commission as certificate No 3, which, as well as No. 2, was given to the Tilden electors.

Three grounds of objection are stated in the paper filed in opposition to that certificate: (1) That it is not duly certified by any one holding the office of governor at the time the electors were appointed, nor at the time when they exercised their functions, nor until after their duties had been fully discharged. (2) Because the alleged proceedings are *ex post facto* and do not confer any right to those persons to cast the electoral vote of the state. (3) Because the proceedings being retroactive are null and void and of no effect.

Mention should also be made that an objection was also filed in the case applicable to both of the two preceding certificates, in which the objectors deny the validity of those certificates upon the ground that certificate No. 1 is in all respects regular, valid, and sufficient, and that the electors therein named were duly appointed to cast the electoral vote of the state.

Properly analyzed and construed it is clear, from the several objections filed to the certificates, that the returns of the state canvassers, including that made by the attorney-general, are the only returns called in question, the charge being that the return of the state board, which is the basis of the Hayes certificate, is false, forged, and counterfeit.

Exception is also taken by the other side to certificates Nos. 2 and 3, but it is not alleged that they are false or forged, nor that the returns on which they are based are false or manufactured, nor that the election to which they refer was not lawfully held and properly conducted.

Intelligent inquirers will see at a glance that all of the certificates refer to the same election, to wit, to the election held on the 7th of November, and that no one of the objections call in question either the validity or the regularity or fairness of that election. Neither side proposes to institute any scrutiny into the votes cast or to require any investigation as to the qualification of the voters who cast the votes, nor do they attack the conduct of the officers who presided in the precincts, nor the returns which the precinct officers made to the county canvassers. Every thing of that sort may be dismissed from consideration as not within the jurisdiction of the Commission, because not submitted to its judgment and decision, and the remarks apply with equal force to the returns made by the county canvassers, for the reason that none of the objections attack either the truthfulness or fairness of those returns, nor do they propose any inquiry into the conduct of the officers who made those returns.

Strenuous opposition is made to certificate No. 1, and those who object to it insist that the return of the state canvassers on which it is founded is false, and the offers of proof point out more particularly the specific grounds of the charge. Decided opposition is also made to the other two certificates, chiefly that the officers who made the instruments were unauthorized to give any such certification, and that the certificates are of no legal validity.

Viewed in the light of these suggestions it is clear that the argument of inconvenience is a mere hollow pretence and that it is entitled to no weight.

Precinct returns were duly made to the county canvassers and the county canvassers made due returns to the secretary of state, where they still remain on file, as appears by the certified copies of the same among the papers submitted to the Commission by the two Houses. What the objectors to certificate No. 1 charge, when expounded in the light of the offers of proof, is that the state canvassers unlawfully rejected the entire return from the county of Manatee and

parts of the respective returns from the counties of Hamilton, Jackson, and Monroe; that the state board by those unlawful acts, changed the result of the election and created the unlawful basis on which certificate No. 1 is founded.

Both the certificate of Governor Stearns and the certificate of the attorney-general are founded upon the same county returns, except the returns from the county of Manatee, and parts of the respective returns from the counties of Hamilton, Jackson, and Monroe, which were excluded from the basis on which Governor Stearns issued his certificate. He adopted the basis formed by the state canvassers, excluding the whole of the return from one county and parts of the returns from the three other counties.

All the county returns, as before remarked, are on file in the office of the secretary of state, and the attorney-general, who was one of the state canvassing board, denying the right of the board to reject a county return without good cause shown, or to mutilate or tamper with such returns under any circumstances, dissented from the acts of the other two members of the board. Apparently his conduct was open and frank, and he, on the same day, canvassed the entire county returns, and finding that the returns when honestly counted, elected the Tilden electors, he executed certificate No. 2, and it appears that the four persons therein named met on the same day in the same building with the persons named in certificate No. 1, and cast their votes for President and Vice-President.

None of these facts can be successfully controverted, as all the returns are on file in the office of the secretary of state, and duly certified copies of the same, together with the original certificates, are now before the Commission, having been submitted by the order of the two Houses in the regular course of their action.

Few, I presume, will deny that it is competent for the Commission to take notice of the statutes of the state relating to the matter in controversy without any formal proof of their legal authenticity. Suppose that is so, then there are

no matters involved in the issues presented which may not be thoroughly examined in a very few hours. Differences of opinion may exist as to the legal effect of the evidence if admitted, but I have yet to learn that any one denies that the alleged facts are capable of being proved by authentic documents in the archives of the state. Certified copies of the record and judgment of the court in the *quo warranto* proceedings are also here, ready to be introduced, and no one, I suppose, will deny that a duly exemplified copy of a record and judgment between the same parties would be admissible in this case, unless it be held that the action of the state canvassers or the certificate of the governor closes the door to all investigations and is sufficient to show that this Commission is so high that it has no power to investigate either fraud, perjury, or forgery.

Extended argument to show that the certificate of the governor is not conclusive seems to be unnecessary, as the opening counsel supporting certificate No. 1 disclaims that proposition, and very properly admits that it is only *prima facie* evidence of what it certifies to be true. Such a certificate made by an officer charged with the duty of making it imports verity, and it is doubtless true that it affords a *prima facie* right in the holder in the absence of any showing whatever to the contrary.

Grant that, but I suppose it was never heard that evidence of a mere *prima facie* right could have the effect to exclude all opposing testimony to show that the right did not exist, or that it had no other foundation than fraud and forgery. Fraud it is said will vitiate everything, and it is a maxim which has fewer exceptions than any other known to the common law.

Evidence of error is sufficient to overcome a *prima facie* presumption, but it was never heard that such a presumption is sufficient to shut out all proof of fraud. With all respect to those who advocate that proposition, I must be allowed to say that such a decision was never made, and it is presumed never will be, by any just and intelligent tri-

bunal. Considerable time was spent in argument by counsel who support the Hayes certificate to convince the Commission that they do not maintain any such proposition, and I am convinced that if they do, it cannot properly be adopted by the Commission.

Concede that, and it follows that evidence in a proper case may be admitted to prove fraud or forgery in the certificate given in such a case by the governor of the state. Credentials of the kind are founded upon a prescribed basis, regulated by law, which is usually dependent for its accuracy, not upon the doings of the governor, but upon the acts of other public agents. Whether that basis is truth or error, he does not know, and consequently the legal effect of his certificate is, whatever may be its form, that it appears to him, in view of that prescribed basis, that the party interested is duly elected to the particular office in question, which is sufficient to show that it would be monstrous to hold that such a certificate is a muniment of title which cannot be contradicted.

Even suppose that is so, still it is insisted by the same counsel that the action of the state canvassers, pursuant to the fourth section of the state act of the 27th of February, 1872, is conclusive, and that this Commission, in view of the action of that board and of the provision of the state law, is not authorized to admit evidence of any kind to show that their return is not true or that it is fraudulent, nor even that it is a forgery. Startling as the proposition is it will require careful examination, in view of that statute.

Certain persons are designated in the introductory part of the fourth section of the statute to meet at a prescribed time, at the office of the secretary of state, to form a board of state canvassers, and that board is required to canvass the returns of the election—meaning the county returns filed in the office of the secretary of state—and to determine and declare who shall have been elected \* \* as shown by such returns.

Obviously they are required to canvass the county returns

filed in the office of the secretary of state, and to determine who are elected, AS SHOWN BY SUCH RETURNS. If the provision stopped there it would be clear that the sole duty of that board would be to canvass and declare the result shown by those returns, but it does not stop there, and consequently it becomes necessary to examine the residue of the section.

They are required to examine those returns and no others, and the farther provision is that if any such return shall be shown, or shall appear to be "*so irregular, false, or fraudulent*" that the board shall be *unable to determine the true vote* for any such officer or member, they shall so certify, and shall not include such return in their determination and declaration. Unless the return shall be shown or shall appear to be *so irregular, false, or fraudulent* that the board is unable to determine the true vote, they have no authority to reject such a return, and they have no jurisdiction to mutilate or alter it under any circumstances. Where the return is so irregular, false, or fraudulent that they cannot determine the result without rejecting such a return, they shall not include it in their return, but they must certify that fact. It is difficult to see why they are required to certify the fact unless their action is subject to review. Confirmation of that view is also derived from the fact that the secretary of state is required to preserve and file in his office all such returns, with such other documents and papers as he may receive.

Proof that any such irregular, false, or fraudulent return from a county was filed in the office of the secretary of state is entirely wanting, and nothing of the kind is suggested in the objections filed by either party; nor would it afford any argument to exclude investigation if it were otherwise, as the case shows that all the evidence is preserved in the office of the secretary of state, and certified copies of the same are among the papers transmitted to the Commission.

Beyond question the provision assumes that a county return may be so irregular, false, and fraudulent that the

board will be unable to determine the true result unless such defective return be rejected; and if so, they shall so certify and shall not include such return, but the return is to be filed and preserved in the office of the secretary of state.

None of the objections set up any such state of things, nor does any one pretend, I think, that any of the returns filed in the office of the secretary of state come within the category of that provision. Should it be said that the presumption is that the board performed its duty, the answer to that is that such a presumption is merely a *prima facie* one, which may be overcome by competent proof, and that a brief examination of the documents will be sufficient to enable the Commission to determine whether the charge that the board, in order to change the result of the election, were or were not guilty of fraud, perjury, or forgery. Opportunity to introduce evidence is asked, and the proper response to the request in my judgment is, let the evidence determine the issue between the parties.

Candid men everywhere will agree, I think, that the board was directed to include regular returns, and that they had no right to exclude any one unless it was so irregular, false, or fraudulent that if included they would be unable to ascertain and determine the true vote or result. Those supporting the objections to certificate No. 1 allege and propose to prove that the board threw out returns which were neither irregular, false, or fraudulent, in order to change the result of the election, and in my opinion they are entitled to that privilege if the evidence offered is competent and tends to prove the charge.

Imputations of the kind are explicitly made, and the main question, under the order adopted by the Commission, is whether evidence is admissible to prove the accusation. No one here, I suppose, will deny that in general such evidence in an issue between party and party is admissible, but the argument is that in the case under consideration neither Congress nor the Commission has jurisdiction to try such an issue.

Electoral votes are to be transmitted to the President of the Senate, and the provision of the Constitution is that the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and that "the votes shall then be counted."

Wide differences of opinion prevailed, pending the passage of the act creating the Commission, as to the meaning of that clause: one side maintaining that the votes should be counted by the President of the Senate, and the other that it was both the right and the duty of the two Houses to inquire and determine whether the votes returned and opened in the presence of the two Houses are the true votes given by "the duly appointed electors" of the state. Discussion rarely ever surpassed followed. Suffice it to say the bill became a law almost by general consent. Parties and counsel seem indisposed to open that discussion, nor is it my purpose to enter that field, except to say that in my judgment the verdict of posterity will be that it is the duty of Congress to count the votes and to solve every question involved in the performance of that duty.

Under the act creating the Commission the provision is that where more than one return from a state has been received by the President of the Senate, the same shall be opened by him in the presence of the two Houses, and shall be submitted to the Commission to determine which is the true and lawful electoral vote of the state. Written objection may be made to such certificates, and when made, if there be more than one, the requirement is that all such certificates, votes, and papers, and all papers accompanying the same, together with the objections, shall be forthwith submitted to the Commission, which shall proceed to *consider the same*, with the same powers, if any, now possessed for that purpose by the two Houses acting separately or together.

Important duties are required of the Commission, as follows: (1) They are required to consider all such certificates, votes, and papers objected to, and all papers accompanying

the same. (2) They are required to decide by a majority of votes whether any and what votes from such state are the votes provided by the Constitution of the United States, and how many and what persons were duly appointed electors by such state.

Express requirement is made that the Commission shall perform those duties, and the act further provides that they "may therein take into view such petitions, depositions, and *other papers*, if any, as shall by the Constitution and now-existing law be competent and pertinent in such consideration."

Duties such as those required cannot be properly performed without evidence nor without hearing the parties interested. By the express words of the act the Commission may take into view such petitions and depositions, if admissible by the Constitution and the existing laws, provided they are pertinent to the matter under consideration, which shows to a demonstration that Congress never intended that the Commission should determine the questions submitted without evidence, any more than without giving the parties an opportunity to be heard.

Conclusive support to that view is also derived from the form of the oath the commissioners are required to take and subscribe before entering upon the duties prescribed by the act. Every member of the Commission solemnly engaged by that oath that he would impartially examine and consider all questions submitted to the Commission and a true judgment give thereon, agreeably to the Constitution and the laws.

Two of the questions submitted are as follows: (1) What votes from the state are the true votes? (2) What persons were duly appointed electors in such state? You are all sworn to impartially examine and consider those questions and a true judgment give thereon, agreeably to the Constitution and the laws. How can you comply with that requirement unless you admit in evidence the documentary evidence from the office of the secretary of state and an

exemplified copy of the record and judgment in the suit between these contestants.

Jurisdiction is the power to hear and determine, and it is to me past comprehension how any person accustomed to legal investigation can read the act of Congress creating the Commission and still entertain a doubt that the Congress intended that the Commission should examine and consider those two questions and give a true judgment thereon, agreeably to the Constitution and the laws. Common experience is sufficient to convince every person of ordinary intelligence that a true judgment cannot be given without evidence nor without a hearing. Tribunals of justice are not expected to shut their eyes to evidence and decide blindly without hearing the parties.

Unless parties are allowed to give evidence they are not benefited by being heard upon the merits of the controversy. By the terms of the order under which they have been heard the merits are excluded, and if the Tilden electors are not permitted to give evidence the merits must be decided in favor of the other party without any hearing. Worse than that; the case was practically decided before it was submitted to the Commission, and it must be sent back without any one of the questions presented in the objections having been examined or considered by the Commission.

Congress never would have passed the law if those who favored its passage had supposed that the only duty the Commission had to perform was to certify to the two Houses the enumeration made by the state board of canvassers. Nor would the President of the United States have considered it his duty to send a special message to Congress commending the measure if he had supposed that the jurisdiction of the Commission was limited to a mere clerical enumeration of the votes certified and transmitted to the President of the Senate.

Two branches of the government were stopped to enable the members of the Commission to sit and hear these cases,

and now it is gravely contended by members of the tribunal that the Commission can neither hear evidence nor decide the questions presented in the written objections submitted to the Commission by the two Houses, beyond the mere enumeration of the votes. Duties of the kind are usually performed by a county judge upon the desk before him, without referring the cause to a master. Others must argue such a question, if they see fit, but I cannot, as it seems to me that the proposition calls in question the wisdom of Congress and involves a theory which is past belief.

Both Houses of Congress knew full well that there were in the contested cases charges of fraud, perjury, and forgery, and it is clear to a demonstration, in my judgment, that those charges in respect to the returns made by the state board should be examined, considered, and decided by this tribunal, so far as the charges are involved in the objections filed to the certificates submitted to the Commission by the two Houses of Congress.

When the Commission was organized the whole country expected that those charges would be heard and that a true judgment would be given thereon, and sound discretion and a due regard to the words of the act of Congress forbid the conclusion that the action of the state board in rejecting the county returns from the county of Manatee and parts of the returns from the three other counties named is a matter the Commission cannot examine, consider, and decide, the charge, as alleged, involving fraud, perjury, and forgery. Such a decision, in my judgment, is forbidden by every consideration of law and justice, and if made, I fear that it will shock the public sense, and when the knowledge of it reaches other lands I shall be greatly disappointed if it does not shock the wise and just throughout the civilized world.

Without the right to introduce evidence a trial in any case is a mockery, and in this case the refusal to hear evidence is the height of injustice, as it amounts to an ex-parte decision in favor of the persons claiming title under certifi-

cate No. 1, without having examined or considered any one of the objections filed to that supposed muniment of title.

Explanations to sustain that proposition are unnecessary, as it is obvious that they claim title under the certificate of Governor Stearns, founded upon the return of the board of state canvassers. Unlike that, the Tilden electors allege that the return which constitutes the basis of that certificate is false and fraudulent and that the canvassers tortiously and unlawfully excluded from the count the votes of one county and part of the votes from three other counties, for the express purpose of changing the result and of defeating the well-known choice of the people at the general election.

Formal charges of the kind are made in the objections, and are also contained in the offers of proof, and the counsel opposing the certificate in question allege that authentic documents are at hand to prove those charges, and to show that the certificate signed by the attorney-general, which is also based upon the county returns filed in the office of the secretary of state, expresses the true result of the election, the sole difference being that the attorney-general in his computation included the return from the county of Manatee and the votes from the other three counties which were excluded by the board of state canvassers, and assertions of the kind may be investigated without difficulty and in a brief period.

Contest arose at the same time between the rival candidates for governor, in consequence of which a suit was commenced in the supreme court of the state on the relation of George F. Drew, one of the candidates, v. Samuel B. McLinn & als., which was decided on the 25th day of December, 1876, the court holding to the effect that the state canvassers had no authority to reject a county return or the votes given, except when the canvassers were unable to ascertain for whom they were cast, for the reason specified in the fourth section of the act prescribing their duties.

Acquiescence in that decision was universal, and the legislature, on the seventeenth of January following, passed a

law creating a new board of state canvassers, and directed that a new canvass should be made of the county returns of the election held on the 7th of November in the preceding year. Agreeably to that law the board was organized, and they re-canvassed the same returns and came to the same result as that previously reached by the attorney-general of the state.

By the third section of the act they were required to make and sign a certificate containing the whole number of votes given at the election and to declare the result, and the further requirement is that the certificate shall be recorded in the office of the secretary of state. Requirements of the kind were all fulfilled and the certificate was duly made and signed, which is the basis of certificate No. 3, executed by the present governor of the state.

Viewed in any light it must be admitted that it is confirmation strong as Holy Writ that certificate No. 2, signed by the attorney-general, is true, and that it gave the true and honest result of the election. Investigations made by the legislature induced that body to come to the same conclusion, and on the 26th of January following the legislature passed a statute in which it is enacted that the Tilden electors, on the 7th of November previous, were duly chosen and appointed electors by and on behalf of the state and in the manner directed by the legislature. "Each state shall appoint, in such manner as the legislature thereof may direct," the number of electors to which the state is entitled, subject to the exception therein contained.

None of these proceedings were intended to choose new electors, but merely to ascertain who were elected at the antecedent general election, and they show beyond peradventure that the return of the first board of state canvassers was false and fraudulent, and that the result could only have been reached by perjury and forgery.

Power is certainly vested in a state to appoint electors in such manner as her legislature shall direct, and all agree that the statute of the state required that the electors should

be chosen by the qualified voters of the state; nor is it controverted by any one that the election held on the 7th of November, 1876, was duly notified and regularly conducted; nor that the returns of the local officers were regularly and in due form of law made to the county canvassers.

Prescribed duties are to be performed by the county canvassers, and they are required to transmit their returns to the secretary of state, and it is certain that the objections filed to the respective certificates do not impugn the county returns, nor is there any evidence before the Commission to justify any one in calling those returns in question as irregular, false, or fraudulent. Imputations of the kind are explicitly made against the returns of the board of state canvassers, as before fully explained.

Electors are to be appointed by the state, and the state very properly claimed the right to inquire and ascertain who had been chosen at the election held for that purpose. Charges of fraud, perjury, and forgery hanging over the old board, the legislature, by a public law, approved by the governor, made provision for a new board, and directed the new board to canvass the same county returns on file in the office of the secretary of state, and to report the result of their doings. They performed that duty, and the legislature, by a public act, ratified their doings, and enacted that the Tilden electors were duly chosen on the 7th of November previous, and that they are the electors duly appointed by the state.

Opposed to this there is nothing to support the pretensions of the Hayes electors, except the certificate of Governor Stearns, founded upon the return of the old board of state canvassers.

These proceedings constitute the basis of certificate No. 3, and they show that the proceedings and the certificate were intended to confirm as true what is certified in the certificate of the attorney-general, and it is clear, in my judgment, they are properly admissible, and amply sufficient for that purpose.

Matters of the sort may be readily investigated in a very brief space of time, as every impartial person must see from the very nature of the transactions.

States may appoint electors in such manner as their legislature may direct, and the judiciary of the state may interpret such laws, and the decision of the state court in such a case must be regarded as the rule of decision, as appears by the express enactment of Congress.—(1 Stat. at Large, 92. *McKeen vs. Delancy*, 5 Cran., 22.) Circuit courts in that state have power to issue writs of *quo warranto* and all other writs proper and necessary to the complete exercise of their jurisdiction.—(State Const., Art. VI., sec. 8.)

Proof of the most satisfactory character is exhibited in the papers transmitted to the Commission that the old board of state canvassers did not complete their canvass until the 6th of December, 1876, and that the certificate given to the supposed Hayes electors bears date on that day. It appears, also, that the certificate given to the Tilden electors and signed by the attorney-general bears the same date, as exhibited in the documents printed by order of the Commission. Both sets of electors met at the capital of the state on that day, as required by law, for the purpose of executing the functions of electors, but the Hayes electors before they voted were served with process in *quo warranto* sued out from the circuit court of the second judicial circuit of the state by the Tilden electors. They sued in their own behalf as well as in behalf of the people of the state, as they had a right to do under the law of the state, inasmuch as the attorney-general refused to institute the proper proceeding.

Service being made, the respondents appeared and filed an answer. Subsequently proofs were taken on both sides, and the parties having been fully heard, the court, on the 25th of January following, entered a decree in favor of the relators.

By that decree the court adjudged (1) That the Hayes electors were not, nor was any one of them, elected, chosen,

or appointed electors. (2) That they were not, on the said 6th of December, or at any other time, entitled to assume or exercise any of the powers and functions of such electors. (3) That they were upon the said day and date mere usurpers, and that all and singular their acts and doings as such were and are illegal and void. (4) That the Tilden electors all and singular were at said election duly elected, chosen, and appointed electors of the state, and were on the said 6th of December entitled to be declared elected, chosen, and appointed as such electors and to have and receive certificates to that effect, and at all times since to exercise and perform all and singular the powers and duties of such electors.

Prior to the rendering of the decree in this case the new board of state canvassers had made their report, and on the following day the legislature passed the act to declare and establish the appointment of electors, by which it is enacted that the Tilden electors were, on the 7th of November previous, duly chosen and appointed as such, with all the powers incident to such offices.

Repeated admissions have been made during the discussion that a state may determine what persons the qualified voters have chosen and appointed electors of President and Vice-President, but the proposition is advanced that the determination must be made before the electors meet and cast their votes, and that it cannot be made at any subsequent time. Antecedent investigation could not be made in this case before the electors voted, for the reason that the old board of state canvassers did not make their return until the day when the votes were cast; nor were the Hayes electors furnished with the certificate of the governor until that day. All that could be done by the way of investigation before that time was done, as appears by the certificate of the attorney-general, which was also given to the Tilden electors on the same 6th of December. Without a moment's delay the Tilden electors sued out a writ of *quo warranto* against the usurpers, and by extreme diligence caused

it to be served on them one hour before they cast their votes.

Weighed in the light of these suggestions, the proposition that subsequent investigation cannot be made is monstrous, as it shows a mockery of justice. You may investigate before the votes are cast when it is impossible for want of time, but you shall not after that, as you would then have an opportunity to ascertain the truth !

Canvassers may, if they see fit, keep back their report until the day appointed for the electors to meet, and if they do so the effect of the proposition is that there can be no investigation, no matter how enormous the fraud has been. Forgery and fraud ought not to go unexposed, but if the proposition submitted is correct it necessarily follows that the state is powerless to protect itself from the consequences of such crimes.

Whatever could be done by every branch of the state government to establish the truth was done, and if it now be decided that their efforts are fruitless, the effect must be to offer impunity in the future to all scheming officers who may tamper with subordinate returns in order to change the result of an election.

Opposing candidates for governor of the state were in the field at the same election, and it appears that the board of state canvassers threw out sufficient of the county returns to elect the incumbent who gave the certificate to the Hayes electors. His opponent, the present governor, (Drew,) brought mandamus against the members of the canvassing board, praying that they may be decreed to correct their return. Process was served and the respondents appeared and filed an answer. Both sides took proofs and the parties went to trial.

Authority to issue mandamus is vested in all the courts of the state. The proceeding in this case was in the supreme court, and that court decreed that all that the state board of canvassers can do in such a case under the statute creating it, must be based upon the returns; that everything they

are authorized to do is limited to what is sanctioned by the authentic and true returns before them ; that their final act and determination must be such as appears from, and is shown by, the returns from the several counties to be correct ; that they have no general power to issue subpoenas, to summon parties, to compel the attendance of witnesses, to grant a trial by jury, or to do any act but determine and declare *who has been elected, as shown by the returns.*—(State ex rel. George F. Drew v. Samuel B. McLin & als., 15 Florida R.)

Special reference is made in that case to the return from the county of Manatee and to those from the three counties of Hamilton, Jackson, and Monroe. By that opinion it appears that the answer set up that there was such irregularity and fraud in the conduct of the election that the board could not ascertain the true vote. Responsive to that defence the court say that “ the facts stated in the answer present a judicial question beyond the power and jurisdiction of the board, that a return of votes cast in a county at such a general election, duly signed by the proper officers and regular in form, \* \* \* is a return which the state officers must count, as it is neither irregular, false, nor fraudulent within the meaning of the statute.”

Comment is also made in the same opinion upon the action of the state board in respect to the other three counties, and the decision is to the effect that if the return is genuine and in due form, the question whether the irregularities shown to have existed at the election are sufficient to reject the same is a question of law not within the power of the board to determine, that what is fraud in such an inspector is a question of law, so also is the question whether such a fraud by inspectors can vitiate an election. Both are judicial questions beyond the power of the board to determine.

Unless it be denied that the construction of a state statute given to it by the supreme court of the state furnishes the rule of decision, it would seem to follow that the board of state canvassers exceeded their jurisdiction, and if so all must concede that their acts are null and void.

Five years before that, the supreme court of the state decided that the object of the statute in question is to ascertain the whole number of votes cast and who had received the highest number of votes, so that the choice of the majority of the voters might be ascertained and respected, that if the facts stated by the relator were correct, that returns made had not been included in the canvass, then the board of state canvassers had not performed their duty, that their duties are ministerial, beyond that of determining that the papers received by them as returns are genuine authentic returns of the election, that they are required by law to meet on a given day for the purpose, and may adjourn from day to day until their duties are accomplished, and in case legal returns are received by them at any time before they complete the canvass, which would have been counted if received before the canvass was commenced, it is their duty to include such in the canvass and certificate, and if they refuse they may be compelled by the writ of *mandamus* to complete the canvass of all the returns received, and to certify the result according to law.—(State ex. rel. Bloxham v. The Board of State Canvassers, 13 Florida, 73.)

Proper opportunity to investigate such charges ought to be permitted at some time, and if it is not possible to accomplish that object before the day appointed for the meeting of the electors, justice and necessity demand that it shall be allowed subsequent to that time, for it would be too great a triumph for injustice to hold that it must be postponed forever because the outrage was committed so near to the time designated for the performance of the duty that it was impossible to institute and close the scrutiny before the accessaries in guilt have actually enjoyed the stolen privilege which belonged to the complaining party.—(Queen v. Vestrymen of Pancras, 11 Ad. & Ell., 25.)

Three points were decided by the exchequer chamber in *Rochester v. The Queen*, 1 Ell., Bl. & Ell., 1031, which support the proposition that it was not too late to make the investigation: (1) That the court ought to compel the per-

formance of a public duty by a public officer, although the time prescribed by statute for the performance of the same has passed. (2) That if the public officer to whom belongs the performance of such a duty has in the meantime quitted his office and has been succeeded by another, it is the duty of the successor to obey the commands of the court. (3) That all statutes are to be construed with reference to the known, acknowledged, recognized, and established power of the proper court to superintend and control inferior jurisdictions and authorities of every kind.

Due service of process in the *quo warranto* suit was made at the earliest possible moment, and it is not even suggested that any greater diligence could have been employed in bringing the litigation to a close. Prompt investigation was made by the new board of state canvassers, and the legislature enacted the statute declaring that the Tilden electors were duly chosen and appointed the next day after the decree was entered in the *quo warranto* suit. Neither the public nor the citizens have any power to defeat the machinations of fraud, perjury, and forgery if the measures adopted for that purpose in this case are held to be ineffectual and insufficient.

For these reasons I am of the opinion that the evidence offered should be admitted and that the other side should be permitted to give evidence in reply.

Debate being closed the Commission adopted the following order, moved by Mr. Justice MILLER:

*Ordered*, That no evidence will be received or considered by the Commission which was not submitted to the joint convention of the two Houses by the President of the Senate, with the different certificates, except such as relates to the eligibility of F. C. Humphreys, one of the electors.

Adopted—yeas 8, nays 7.

Commissioner ABBOTT moved the following:

*Ordered*, That in the case of Florida the Commission will receive evidence relating to the eligibility of Frederick C.

Humphreys, one of the persons named in certificate No. 1, as elector.

Adopted—yeas 8, nays 7.

Notice was given to counsel of the result and that the Commission was ready to proceed with the case. Witnesses were examined on both sides in respect to the eligibility of Frederick C. Humphreys, as an elector, and their testimony is fully reported in the record of the proceedings. The testimony being closed, counsel were heard upon the merits, under the third rule prescribed by the Commission, and at the conclusion of the argument the spectators retired and the Commission went into consultation with closed doors. Discussion ensued, in which several of the members of the Commission participated. During the discussion as to the eligibility of Frederick C. Humphreys, Mr. Justice CLIFFORD stated his conclusions on the matter, as follows:

1. That no person is eligible as an elector, or can be lawfully appointed as such, who holds an office of trust or profit under the United States at the time of the election or appointment.

2. That the office of shipping commissioner is an office of trust and profit under the United States.

3. That Frederick C. Humphreys was legally appointed to that office.

4. That the evidence introduced fails to show a complete legal resignation of the office by the incumbent before the 7th of November, 1876.

5. That if he had performed official acts after the date of the correspondence between him and the judge of the circuit court, his acts would have been legal.

6. That if the incumbent had subsequently decided, with the consent of the judge, to retain the office, he might have done so without a new appointment, because his letter to the judge had never been filed.

7. That inasmuch as the evidence shows that both the judge and the incumbent regarded the resignation as complete and it appears that the incumbent never did perform



any subsequent official act, I am of the opinion that, in an equitable view, the person named ought to be regarded as having been eligible as an elector on the day when the election was held.

Other members of the Commission discussed the whole case in view of the papers submitted to the Commission by the President of the Senate, but Mr. Justice CLIFFORD believing that discussion would be unavailing and useless, took no further part in the debate.

Commissioner HUNTON moved an order to the effect that the Tilden electors were duly appointed by the state, and their votes as certified in certificate No. 2 are the votes provided for by the Constitution. Rejected—yeas 7, nays 8.

When that result was announced Commissioner GARFIELD moved that the Hayes electors were duly appointed and that the votes cast by them are the votes provided for by the Constitution. Also, that Commissioner EDMUNDS, Mr. Justice BRADLEY, and Mr. Justice MILLER be appointed a committee to draft a report of the action of the Commission, as required by law. Adopted—yeas 8, nays 7.

None of the subsequent proceedings in the case need be reproduced, as they are given in full in the *Congressional Record*.

Like submissions were made to the Commission in the cases of Louisiana, Oregon, and South Carolina, the proceedings in which cases are also published in the same record, but Mr. Justice CLIFFORD did not participate in those discussions, having become thoroughly convinced that nothing he could say would be of any public benefit.